

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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JUN 13 2005

In the Matter of

Amendment of Section 73.202(b)

Table of Allotments

FM Broadcast Stations

(Llano and Junction, Texas)

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)  
)  
)  
)  
)

MB Docket No. 05-151

RM - 11222

Federal Communications Commission  
Office of Secretary

To: Office of the Secretary

Attn: Assistant Chief, Audio Division

Media Bureau

**SUPPLEMENT**

1. On May 11, 2005, Capstar TX Limited Partnership, CCB Texas Licenses, L.P., Clear Channel Broadcasting Licenses, Inc., and Rawhide Radio, L.L.C. (together, "Joint Parties") filed comments in the above-captioned proceeding noting that the petition in this proceeding was in conflict with the Joint Parties' counterproposal in MB Docket No.05-112 (Fredericksburg, Texas). Because of this conflict, the Joint Parties requested that the two proceedings be consolidated into a single proceeding.

2. On May 25, 2005, Munbilla Broadcasting Properties, Ltd. ("Munbilla") filed reply comments in this proceeding alleging that the Joint Parties' counterproposal in Docket 05-112 was defective, and arguing that the two proceedings should not be consolidated. The defect, Munbilla alleged, arose because one component of the Joint Parties' counterproposal, the allotment of Channel 297A at Llano, failed to protect Munbilla's construction permit for Burnet, Texas, File No. BPH-20030902ADU. The Joint Parties disagree that this short spacing renders their counterproposal defective. Their reasoning is set forth in a pleading submitted in Docket 05-112 and attached hereto as Exhibit A.

3. Briefly, the Joint Parties' proposal for Channel 297A was on file and cut off long before Munbilla filed its application. Munbilla accepted the risk that its construction permit could be rescinded if the proposal were granted. Its construction permit is explicitly conditioned on the outcome of the proceeding. The Joint Parties' counterproposal in Docket 05-112 is the same counterproposal as their counterproposal in Docket 00-148. It was submitted in Docket 05-112 in order to continue to secure the Joint Parties' priority in time. This situation is not the same as *Auburn, Alabama et al.*, 18 FCC Rcd 10333 (2003), in which a rule making proposal was accepted contingent on an effective but non-final change to the FM Table of Allotments, because in this case there has been no such effective but non-final change. This is a case of first impression, and the Commission should hold that Munbilla cannot remove the contingency from its construction permit by claiming cut-off protection against the Joint Parties, when it was the Joint Parties who were on file first.

4. Nevertheless, a solution to this problem is available. In their filing in Docket 05-112, the Joint Parties submitted a simple modification to their counterproposal that removes the conflict and protects the Burnet construction permit. The modification, a change to the transmitter site coordinates for the Llano allotment, is a minor correction which can be made at any time. Moreover, the alternate transmitter site location for Channel 297A at Llano was already in the record of this proceeding, having been proposed by the petitioner in this case.

5. Munbilla also alleges that the Joint Parties' counterproposal is defective because it is duplicative of the Joint Parties' counterproposal in MM Docket 00-148. But the Joint Parties are merely exercising the same right that Munbilla and others have exercised: the right to file a rule making proposal contingent on the outcome of MM Docket 00-148 pursuant to the Commission's *Auburn, Alabama* policy. Munbilla owes its entry into this proceeding to the

*Auburn, Alabama* policy, and it is simple hypocrisy for Munbilla to claim that the Joint Parties are barred when Munbilla is not.

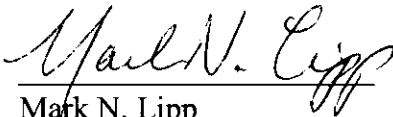
6. This supplement is accompanied by a separate motion for its acceptance. *See* 47 C.F.R. § 1.415(d).

WHEREFORE, for the foregoing reasons, the Commission should consider the Joint Parties' counterproposal in this proceeding with modified coordinates as set forth herein.

Respectfully submitted,

RAWHIDE RADIO, LLC

By:

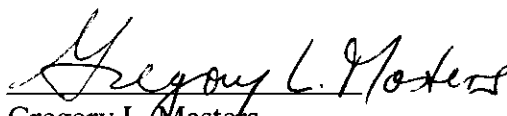
  
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Its Counsel

June 13, 2005

CLEAR CHANNEL BROADCASTING  
LICENSES, INC.  
CCB TEXAS LICENSES, L.P.  
CAPSTAR TX LIMITED PARTNERSHIP

By:

  
Gregory L. Masters  
Wiley Rein & Fielding LLP  
1776 K Street, NW  
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(202) 719-7370

Their Counsel

## EXHIBIT A

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	
Table of Allotments	)	MB Docket No. 05-112
FM Broadcast Stations	)	RM - 11185
(Fredericksburg, Texas)	)	

To: Office of the Secretary  
Attn: Assistant Chief, Audio Division  
Media Bureau

**MOTION TO ACCEPT SUPPLEMENT**

Capstar TX Limited Partnership, CCB Texas Licenses, L.P., Clear Channel Broadcasting Licenses, Inc., and Rawhide Radio, L.L.C. (together, "Joint Parties") hereby request acceptance and consideration of the accompanying Supplement in the above-captioned case. The purpose of the supplement is to propose an alternate transmitter site to avoid a conflict with an outstanding construction permit.

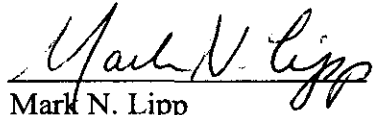
The Commission may accept this supplement as a matter within its discretion. *See Winslow, Camp Verde, Mayer and Sun City West, Arizona*, 15 FCC Rcd 9155 (2000); *Oakville, Raymond and South Bend, Washington*, 17 FCC Rcd 997. Indeed, it is the Commission's policy to avoid such conflicts when possible through alternate transmitter sites. *See Pauls Valley, Oklahoma, et al.*, 13 FCC Rcd 13458 at ¶ 8 (1998). Accordingly, the Commission may accept this supplement as a matter which it would have considered on its own motion. *See Benavides, Bruni and Rio Grande City, Texas*, 13 FCC Rcd 2096 (1998).

WHEREFORE, for the foregoing reasons, the Commission should accept and consider the accompanying Supplement.

Respectfully submitted,

RAWHIDE RADIO, LLC

By:

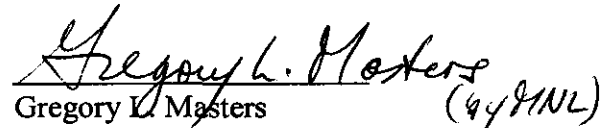
  
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Their Counsel

**CERTIFICATE OF SERVICE**

I, Patricia Gibson, an executive legal secretary in the law firm of Vinson & Elkins, L.L.P., do hereby certify that I have on this 13th day of June, 2005, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Motion to Accept Supplement**" to the following:

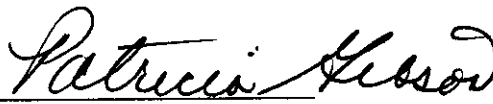
\* Ms. Sharon P. McDonald  
Media Bureau  
Federal Communications Commission  
445 12th Street, SW. Room 2-C221  
Washington, D.C. 20554

Katherine Pyeatt  
6655 Aintree Circle  
Dallas, Texas 75214  
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John J. McVeigh, Esq.  
1201 Blue Paper Trail  
Columbia, Maryland 21044-2787  
(Counsel to Munbilla Broadcasting Properties, Ltd.)

  
Patricia Gibson

\*Hand Delivered

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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Table of Allotments	)	MB Docket No. 05-112
FM Broadcast Stations	)	RM - 11185
(Fredericksburg, Texas)	)	

To: Office of the Secretary  
Attn: Assistant Chief, Audio Division  
Media Bureau

**SUPPLEMENT**

1. On May 9, 2005, Capstar TX Limited Partnership, CCB Texas Licenses, L.P., Clear Channel Broadcasting Licenses, Inc., and Rawhide Radio, L.L.C. (together, "Joint Parties") filed a Counterproposal in the above-captioned proceeding. On May 24, 2005, Munbilla Broadcasting Properties, Ltd. ("Munbilla") alleged a defect in the Counterproposal. Specifically, Munbilla asserts that the Joint Parties' proposal to allot Channel 297A to Llano, Texas was short-spaced by three kilometers to a construction permit granted to Munbilla for Station KHLB(FM), and that the construction permit enjoys cut-off protection from the Joint Parties' proposal. See FCC File No. 20030902ADU.<sup>1</sup>

**I. The Joint Parties' Proposal Is Entitled to Protection from Munbilla's Construction Permit, Not the Other Way Around.**

2. The Joint Parties disagree that this short spacing renders their Counterproposal defective. Rather, it is Munbilla's construction permit that is short-spaced. Munbilla knew about the Joint Parties' proposal for Channel 297A when it applied for its construction permit.

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<sup>1</sup> The Joint Parties were aware of the Munbilla application and discussed it in their counterproposal, but described it as a pending application. In fact, it was granted on June 29, 2004.



Its application disclosed the short spacing. Under prior procedural rules, the application would have been dismissed as defective because it was short spaced to a pending and cut-off proposal. However, Munbilla requested processing under the Commission's recently announced *Auburn, Alabama* policy. See *Auburn Alabama, et al.*, 18 FCC Rcd 10333 (2003). Under that policy, an applicant or rule making proponent may rely on an action in a separate proceeding that is effective but not yet final. Such an application or rule making proposal may even be granted, but the grant is subject to being rescinded if the action upon which it relied is ultimately reversed. This is what Munbilla did. It acknowledged that its application was short spaced to the Joint Parties' proposal, and it accepted the risk that its construction permit could be rescinded if the proposal were granted. Its construction permit is explicitly conditioned on the outcome of the proposal.

3. Munbilla argues that the Joint Parties' counterproposal in Docket 05-112 is a "new" proposal. According to Munbilla, while it may be required to protect the Joint Parties' proposal in Docket 00-148, it has no such obligation with respect to the Joint Parties' proposal in Docket 05-112. However, the situation is not so simple. Substantively, the Joint Parties' counterproposal in Docket 05-112 is the *same* counterproposal as their counterproposal in Docket 00-148. And procedurally, this is a case of first impression. It has come about as a consequence of the Commission's expansive interpretation of the *Auburn, Alabama* policy.

4. In *Auburn, Alabama*, the Commission had initially dismissed two counterproposals because they were conditioned on the outcome of an allotment change that had been granted but was not yet final because it had been the subject of several petitions for reconsideration. However, on reconsideration, the Commission reversed the initial dismissal and granted the two counterproposals. The Commission created a new policy to permit a rule

making proposal or application to be processed and granted upon an effective but non-final grant of an amendment to the Table of Allotments, contingent on the final outcome of the rule making proceeding. *See Auburn, Alabama*, 18 FCC Rcd 10333 at ¶ 23.

5. This case is different. In this case, there has been no effective but non-final grant of an amendment to the Table of Allotments. Instead, there has been a *dismissal* of a rule making proposal, *i.e.*, the Joint Parties' counterproposal in MM Docket 00-148. The Joint Parties promptly appealed that dismissal, preventing the action from becoming final. Their petition for reconsideration was denied, but a timely application for review remains pending. The application for review sets forth valid grounds for the reversal of the Commission's action in Docket 00-148 and grant of the Joint Parties' counterproposal in that proceeding. In particular, the Joint Parties have demonstrated that the counterproposal was complete, free from defects, and consistent with all FCC rules in effect at the time it was filed.

6. Munbilla's application was accepted and granted contingent on the finality of the dismissal in Docket 00-148. This is not the same as the actions granting applications contingent on the finality of the amendments made in a rule making proceeding which were permitted in *Auburn, Alabama*. Here, there is no implementing application for the Joint Parties to file. What the Joint Parties can do, and have done, is remind the Commission of the pendency of the appeal in Docket 00-148 whenever a proceeding is commenced that would conflict with their counterproposal in that proceeding. The Commission has heeded this reminder in other cases. For example, it dismissed petitions for rule making for Benjamin, Texas and Mason, Texas that had been erroneously accepted and docketed. *See Benjamin and Mason, Texas*, 19 FCC Rcd 470 (2004). It took similar actions in *Tilden, Texas*, 19 FCC Rcd 9112 (2004); *Goldthwaite, Texas*, 19 FCC Rcd 4810 (2004); and *Shiner, Texas*, 19 FCC Rcd 4327 (2004).

7. The Joint Parties should not have to remind the Commission of their pending proposal in Docket 00-148. But the Commission continues to accept and docket new conflicting proceedings, as it has done in this proceeding. It continues to accept and grant conflicting applications, as it has done in the case of Munbilla's construction permit. As a result, the Joint Parties have no choice. In particular, they had no choice but to refile their counterproposal in this proceeding, because the Commission had accepted for comment in this proceeding a petition for rule making that was contingent on the outcome of Docket 00-148. The proper action in such a case is to consider the new petition (*i.e.*, the Fredericksburg petition) as a counterproposal to the pending proceeding. *See Benjamin and Mason, Texas*, 19 FCC Rcd 470 (2004). The refiling of the Joint Parties' counterproposal has this effect.<sup>2</sup>

8. In claiming that it has cut-off protection from the Joint Parties' counterproposal in this proceeding, Munbilla is, in effect, attempting to remove the contingency from its contingent construction permit. It is attempting to step in line in front of the Joint Parties, who were clearly in line first. Munbilla gains no support from precedent, because this situation is unprecedented. The Commission did not anticipate this situation when it announced its *Auburn, Alabama* policy, because that case applies only to changes to the Table of Allotments that are effective but not final. It can – and should – hold that Munbilla is not entitled to cut-off protection from the Joint Parties' counterproposal in Docket 00-148 or any refiling of the same counterproposal.

## **II. The Conflict Between the Joint Parties' Counterproposal and Munbilla's Construction Permit Can Be Eliminated by a Minor Change in Transmitter Site.**

9. Nevertheless, the Joint Parties have a way in which the Munbilla construction permit can be protected by making a small modification to their counterproposal. Specifically,

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<sup>2</sup> Moreover, contrary to Munbilla's assertion that the refiling is defective because it is duplicative, the Joint Parties are merely exercising the same right that Munbilla and others have exercised: the right to file a rule making

Channel 297A can be allotted to Llano, Texas at modified reference coordinates and provide clear spacing to all authorized and applied-for facilities. In all other respects, the counterproposal remains the same. The new reference coordinates for the Llano allotment are 30-47-03 North Latitude, 98-38-01 West Longitude. *See* attached channel spacing study. From the modified coordinates, the station will place a 70 dBu contour over 100% of the community of Llano. *See* attached contour map.

10. A transmitter site may potentially be modified at any time during the consideration of a rule making proceeding. Indeed, the Commission's preference is to modify the reference coordinates specified in a rule making proposal in order to protect a pending application or to resolve a conflict between the rule making proposal and an application. *See Pauls Valley, Oklahoma, et al.*, 13 FCC Rcd 13458 at ¶ 8 (1998); *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd 4743 at n.12 (1993). Therefore, the Commission may modify the transmitter site the Joint Parties proposed for Channel 297A at Llano in order to resolve the conflict with the Munbilla construction permit.

11. This supplement is accompanied by a separate motion for its acceptance. *See* 47 C.F.R. § 1.415(d).

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proposal contingent on the outcome of MM Docket 00-148 pursuant to the Commission's *Auburn, Alabama* policy.

WHEREFORE, for the foregoing reasons, the Commission should consider the Joint Parties' counterproposal in this proceeding with modified coordinates as set forth herein.

Respectfully submitted,

RAWHIDE RADIO, LLC

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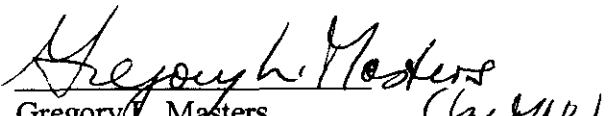
  
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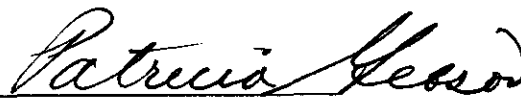
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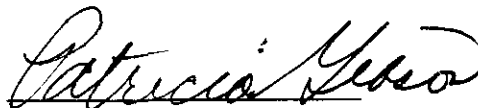
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